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[1]

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 230

ESTATE OF FRANK B. ANDERSON, DECEASED, THE
BANK OF CALIFORNIA, NATIONAL ASSOCIATION,
EXECUTOR, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 11-17) is unreported. The opinion of the Circuit Court of Appeals (R. 72-79) is reported at 126 F. (2d) 46.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 25, 1942 (R. 80). A pe-

tition for rehearing was denied on April 17, 1942 (R. 81). The petition for a writ of certiorari was filed July 14, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether income received by an estate in the year in which final distribution is made of the assets of the estate, is taxable to the estate or to the distributees.

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SUPPLEMENT E—ESTATES AND TRUSTS

SEC. 161. IMPOSITION OF TAX.

(a) *Application of Tax.*—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

* * * *

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate;

* * * *

(b) *Computation and Payment.*—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary * * *.

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and

on the same basis as in the case of an individual, except that—

* * * * *

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

STATEMENT

The findings of the Board of Tax Appeals (R. 12-15) were based upon a stipulation of facts and joint exhibits (R. 25-64). They may be summarized as follows:

Frank B. Anderson died September 17, 1935, leaving an estate in excess of \$2,000,000. In his will he declared that all of his property was community property, one-half of which belonged to his wife, and, after certain specific bequests, he directed that the residue be paid to a bank in trust. Administration of the estate was completed on December 30, 1936 (R. 12).

During 1936 the estate had a net income of \$295,094.48 (before any deduction for distribution to beneficiaries) made up both of ordinary income and of capital gains. All the receipts and assets of the estate, capital and income alike, were mingled in a single account on the books of the estate. During 1936 the estate paid the beneficiary of a specific legacy of stock \$9,500 in dividends and paid another beneficiary an annuity of \$3,600 which the will directed to be paid out of income. During the same year the estate also made cash disbursements of \$853,564.10,¹ divided as follows: \$528,643.93 was paid for federal estate and state inheritance taxes and the remaining assets, after fees and expenses, were distributed in accordance with the will under the decree of final distribution entered by the probate court.² The will made no provision as to whether the death taxes should be paid from income or corpus and the executors made no book entries charging the taxes to either one. (R. 12-14.)

For the year 1936 the estate filed a fiduciary return claiming that it was not taxable on the income of the estate because it had been paid to the

¹ Erroneously stated by Board of Tax Appeals to be \$879,832.31 (R. 13).

² On the date of distribution, December 30, 1936, the only cash remaining in the estate amounted to \$68,770.05, from which \$52,635.70 was paid for executor's and attorneys' fees, \$1,000 for two legacies, \$1,500 was retained in the estate, and the balance of \$13,634.35 was distributed to the residuary legatees: \$11,692.17 to the widow and \$1,942.18 to the trust (R. 14).

legatees. The legatees filed returns including as their taxable income the amount shown as distributable to each on the return filed by the estate (R. 14). The Commissioner determined (R. 58-64) that the entire net income of the estate, less the \$13,100 distributed to specific legatees, was taxable to the estate (R. 14-15). Petitions for review filed by both the estate and the legatees were heard by the Board of Tax Appeals, which sustained the action of the Commissioner in taxing the estate and held that the legatees were not liable (R. 11-17). On appeal by the estate the court below affirmed (R. 72-79). No appeal was taken by the Commissioner from the decision in favor of the legatees.

ARGUMENT

It is certain that income received by an estate in the year of final distribution is taxable either to the estate or to the beneficiaries. Here the distributions made to the legatees during the taxable year were payments of residuary legacies and were not made as distributions of income. Neither the will nor state law gave any legatee a right to receive the income of the estate or required that death taxes be charged to the corpus. In fact the death taxes were paid from a common fund in which the executors had mingled both income and corpus. Consequently the court below held that the distributions to the legatees did not include income payable "as such" and, following

Burnet v. Whitehouse, 283 U. S. 148, concluded that the income was not taxable to the legatees but to the estate.

There is no conflict of decisions. *Weber v. Commissioner*, 111 F. (2d) 766 (C. C. A. 2), cited by petitioners, is distinguishable upon both grounds taken in that decision. The facts were that the executors sold real estate specifically devised to the testator's children and realized a profit which they distributed to the children in the same taxable year. The court held that the profit was taxable to the children to the exclusion of the estate. The chief ground of the decision was that under New York law the children owned the real estate so that entirely apart from section 162 the profit was not taxable to the estate. Whether such a ground could have been taken by the petitioner under California law in respect of the residue need not be considered for the point was not raised. The minor ground of decision in the *Weber* case was that the children were entitled to immediate distribution of the proceeds of the sale, both return of cost and profits, and that the payment of the proceeds was therefore deductible under section 162; "the profit was payable to them as profit, because it was part of the proceeds of sale of the farm" (111 F. (2d) at 768). In the instant case the income was not paid "as income"; the payments were made in distribution of the residue after an amount in excess of the

income had been paid for death taxes. The Supreme Court of California apparently overlooked these distinctions in *Malmgren v. McColgan*, 20 A. C. 454.

Likewise, there is no basis for petitioner's assertion (Pet. 9) that the decision below conflicts with *County Nat. Bank & Trust Co. v. Helvering*, 122 F. (2d) 29 (App. D. C.), and *Sitterding v. Commissioner*, 80 F. (2d) 939 (C. C. A. 4). Both cases held that distributions from an estate to the legatees were not to be considered as income paid and that the books of the estate were not conclusive as to the character of the payments.³ Both cases, therefore, are in full accord with the decision below.

CONCLUSION

There is no conflict of decisions. The petition for certiorari should be denied.

Respectfully submitted.

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AUGUST 1942.

³ In the *County Nat. Bank* case a small part of the income was conceded by the legatee taxpayer to be taxable to him.